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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

LAMAR WEATHERSBY,

Defendant and Appellant.

2d Crim. No. B290767
(Super. Ct. No. YA094297)
(Los Angeles County)

This is the first and hopefully the last time an appellate court has to know about Goldilocks and the Three Bears. Lamar Weathersby, aka “Goldilocks,” appeals an order revoking his probation, previously granted after he was convicted by plea of second degree burglary. (Pen. Code, § 459.)¹ The trial court terminated probation and sentenced appellant to three years felony-jail. (§ 1170, subd. (h)(1).)

While on probation, appellant was prosecuted for another burglary. His trial attorney convinced the jury that

¹ All statutory references are to the Penal Code.

appellant was like Goldilocks and did not enter the victim's residence with the required intent. Appellant was acquitted on the new burglary charge. But the trial court nevertheless revoked probation. We affirm.

Facts and Trial Court Proceedings

Appellant celebrated Thanksgiving Day by entering a vacant and locked house that was listed for sale. Appellant has a good eye for real property. It was a multilevel, 8,000 square foot house in the Hollywood Hills and had a guesthouse. The owner's grandson stopped by to use the swimming pool and encountered appellant leaving the guesthouse. Appellant said he worked for Redfin, a real estate company, and was there to look at the house. Appellant drove away in a silver BMW before the police arrived. After the police searched the house, the owner secured the premises.

The next night, the owner stopped by the house to make sure no one was there. The owner saw the silver BMW and called the police. Los Angeles Police Officer Enoch Park found appellant inside the guesthouse and ordered him out. The owner told the officers that shirts, food, and liquor were missing.² Appellant's cell phone was on the bed and a backpack was on a chair. A bottle of water and a ginger ale can were on the nightstand, next to the rumpled bed. Officer Park determined that the window latch was broken. Appellant's fingerprints were on the ginger ale can.

² This is a theft and the inference seems compelling that appellant was the culprit. The jury, however, apparently did not draw the inference that, at the time of entry, appellant had formed the intent to commit theft.

Appellant defended on the theory that there was no entry with the intent to commit a theft or a felony, a requisite element of burglary. Trial counsel argued that it was like the story *Goldilocks and the Three Bears*. Goldilocks entered the bears' house, ate some porridge and took a nap in the baby bear's bed, but the entry was not with the intent to commit a theft. "So what did Goldilocks do? She was guilty of a trespass. That's what she was guilty of. Just like my client [appellant]. *That's what he's guilty of, a trespass.* But he wasn't charged with that." (Italics added.) Unlike Goldilocks, appellant did more than eat porridge and sleep in the bear's bed. He took the clothing and drank liquor which did not belong to him.

Discussion

We review for substantial evidence. Probation is not a matter of right but an act of clemency, the granting and revocation of which are within the broad discretion of the trial court. (*People v. Urke* (2011) 197 Cal.App.4th 766, 773.) A trial court may revoke probation in the interests of justice if it has reason to believe the probationer committed another offense or violated the terms of his or her probation. (§ 1203.2, subd. (a); *People v. Rodriguez* (1990) 51 Cal.3d 437, 443 (*Rodriguez*).) The facts supporting revocation of probation must be proved by a preponderance of the evidence and probation may be revoked even when the probationer is acquitted on the new charged offense. (*Id.* at pp. 441, 443.)

It is unrefuted that appellant entered a locked, vacant house without the consent of the owner on two occasions. He argues there was no unauthorized entry because he told the grandson that he worked for a real estate company and was viewing the house. There is no evidence supporting this claim

except for his statement to the victim's grandson. Appellant left before the police arrived, returned the next day, and again entered the locked house. At trial, appellant did not claim to be a realtor, nor did it matter. The owner stated that realtors did not have unfettered access to the house, that there was no lockbox on the house, and the owner's sister was the only one with a key to show the house.

Appellant argues that it is not unlawful for a real estate agent to visit a house listed for sale. But that is not what this case is about. Appellant's trial attorney conceded it was a trespass and, like Goldilocks, that appellant is "guilty of, a trespass." Appellant's trial counsel admitted that a trespass was committed. (See, e.g., *People v. Voit* (2011) 200 Cal.App.4th 1353, 1371, fn. 14 [defendant bound by counsel's stipulation or admission in open court]; *People v. Brown* (1989) 215 Cal.App.3d 452, 454 ["relaxed rules of evidence" govern probation revocation proceedings].) There is, of course a factual basis for the admission and it is supported by substantial evidence. The trial court found it was "a clear residential trespass" and although "[t]here was not enough to show his intent on entry, . . . it's still a pretty serious thing when you go into somebody else's house and just take it over and start living there even for a couple of days." We agree and while there is no storybook ending for appellant, it could have turned out much worse. A homeowner has the right to use deadly force to expel an intruder into a residence. Had the owner shot and killed appellant, there is a presumption that the killing would be lawful. (§ 198.5.)

Appellant committed a trespass and violated his probation terms. "[O]nly in a very extreme case should an appellate court interfere with the discretion of the trial court in

the matter of . . . revoking probation. . . .” (*Rodriguez, supra*, 51 Cal.3d at p. 443.) This is hardly an extreme case where we should interfere with the revocation of probation.

Disposition

The judgment (order revoking probation) is affirmed.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P. J.

PERREN, J.

William N. Sterling, Judge

Superior Court County of Los Angeles

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